

Appendix B: Historic Properties Programmatic Agreement

Programmatic Agreement on Protection of Historic Properties During Emergency Response Under the National Oil and Hazardous Substances Pollution Contingency Plan

Table of Contents

Purpose

Legal Authorities

Protecting Historic Properties

Definition of "Historic Property"

Responsibility for Historic Properties

Consideration

Pre-Incident Planning

Federal Lead Emergency Response

Regional PAs Authority, Effective Date, Withdrawal, Amendment

I. PURPOSE

- a. The signatory Federal Departments and Agencies enter into this Programmatic Agreement (PA) to ensure that historic properties are taken into account in their planning for and conduct of the emergency response under the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). 40 CFR Section Part 300. The National Conference of State Historic Preservation Officers (NCSHPO) is also a signatory, on behalf of State Historic Preservation Officers (SHPOs), to facilitate Federal agency ability to develop and execute a uniform nationwide approach for considering and treating historic properties before and during emergency response. In the event an individual SHPO is unable to respond, the Agency or Department may contact the NCSHPO or the Advisory Council on Historic Preservation (ACHP) to consider alternatives and receive assistance. The signatories agree that their Departments/Agencies will follow this PA or, to meet regional needs, develop regional PAs that are not inconsistent with this PA and the National Historic Preservation Act of 1966, as amended (NHPA), P.L. 89-665, 16 U.S.C. Section 470 et seq., and the regulations promulgated thereto.
- b. The NCP does not provide specific guidance for taking historic properties into account during emergency response to an actual or threatened release of a hazardous substance, pollutant or contaminant or the discharge of oil or other pollutants (hereinafter, a release or spill). Also, emergency provisions contained in the regulations implementing Section 106 of the NHPA do not directly address requirements for such emergency responses. Accordingly, for the purpose of this PA, an "emergency" shall be deemed to exist whenever circumstances dictate that a response action to a release or spill must be taken so expeditiously that normal consideration of the Section 106 process is not reasonably practicable.
- c. The purpose of this PA is to provide an alternative process to ensure appropriate consideration of historic properties within the meaning of the NHPA during emergency response to a release or spill. This PA does not address the consultation procedures under Section 106 of the NHPA once that phase of the response action has ended.
- d. In carrying out duties under the NCP, including the priorities of protecting public health and safety, the Federal On-Scene Coordinator (OSC) may have to make emergency response decisions that adversely affect historic properties. By following this PA, however, the Federal OSC will be making an informed decision that takes historic property information into account prior to authorizing actions that might affect such property.
- e. The responsibility of the Federal OSC in protecting public health and safety is paramount. That mission is a difficult one involving problems that cannot be anticipated and calling for judgment on the part of the Federal OSC. Nothing in this PA changes the national response priorities, nor does it change the effect of existing law.
- f. 36 CFR Section 800.13 provides, inter alia, that:

An Agency Official may elect to fulfill an agency's Section 106 responsibilities for a particular program, a large or complex project, or a class of undertakings...through a Programmatic Agreement. 36 CFR Section 800.13(e) provides that:

An approved Programmatic Agreement satisfies the Agency's Section 106 responsibilities for all individual undertakings carried out in accordance with the agreement until it expires or is terminated.

During such time as the ACHP and the NCSHPO are signatories, compliance with this PA by a Federal OSC will be deemed to constitute compliance with Section 106 of the NHPA during pre-incident planning and emergency response activities .

II. LEGAL AUTHORITIES PROTECTING HISTORIC PROPERTIES

a. National Historic Preservation Act

- i. In 1966, Congress instituted a policy to preserve the Nation's cultural and historic heritage by enacting the NHPA. The NHPA implementing regulations most pertinent to actual or threatened releases of hazardous substances, pollutants or contaminants or oil spills are those of: 1) the ACHP, an independent Federal agency that administers Section 106 of the NHPA through procedures specified in 36 CFR Part 800, "Protection of Historic Properties," and 2) the Department of the Interior (DOI) regulations at 36 CFR Part 60, National Register of Historic Places.
- ii. Section 106 of the NHPA provides that Federal agencies are to take into account the effects of "Federal or federally assisted undertakings" on historic properties that are listed in or eligible for inclusion in the National Register of Historic Places. It further affords the ACHP an opportunity to comment on the undertaking.

b. This PA does not address other Federal laws defining and protecting historic properties, such as:

- i. The Archaeological Resources Protection Act (ARPA), 16 U.S.C. Section 470aa et seq., which provides for the protection of archeological sites and other resources. ARPA establishes criminal and civil penalties for actual or attempted illegal excavation or removal of or damage to archeological resources; illegal trafficking in archeological resources; and knowingly causing another to commit an ARPA violation;
- ii. The Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. Section 3001 et seq., which provides for the protection of Native American human remains and other defined classes of cultural items. NAGPRA also establishes criminal penalties for illegal trafficking in these cultural items. 18 U.S.C. Section 1170;
- iii. The Antiquities Act of 1906, 16 U.S.C. Section 433 et seq., which establishes criminal penalties for non-permitted appropriation, excavation, injury, or destruction of any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Federal Government; and
- iv. The National Marine Sanctuaries Act (also known as Title III of the Marine Protection, Research and Sanctuaries Act, 16 U.S.C. Section 1431, et seq., which establishes civil penalties for destruction of, loss of, or injury to a sanctuary resource, including historic properties. In addition to fines, parties can also be held responsible for response costs; damages including replacement cost, restoration cost, or acquisition of an equivalent sanctuary resource, and lost-use value of that resource and interest.

c. Many States also have laws defining and protecting historic properties. Regional PAs may consider State laws relevant to the historic properties in the region, to the extent they are not inconsistent with Federal law.

III. DEFINITION OF "HISTORIC PROPERTY"

- a. The term "historic property" is defined in the NHPA as: "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register"; such term includes artifacts, records, and remains which are related to such district, site, building, structure, or object. 16 U.S.C. Section 470(w)(5).
- b. Criteria for listing a property in the National Register of Historic Places are found at 36 CFR Part 60. The statutory definition of historic properties and the established criteria determine whether a historic property needs to be considered during emergency response. A historic property need not be formally listed on the National Register to receive NHPA protection, it need only meet the National Register criteria (i.e., be eligible for listing in the National Register). Section VI.C.2,

below, discusses determining the National Register eligibility of historic properties during emergency response.

IV. RESPONSIBILITY FOR HISTORIC PROPERTIES CONSIDERATION

- a. For the purpose of this PA, the Federal OSC, as the Federal official designated to coordinate and direct response actions, is responsible for ensuring that historic properties are appropriately considered in planning and during emergency response.
- b. Planning Support/Coordination
 - i. The NCP, at 40 CFR Section 300.210(c), provides that Area Contingency Plans (ACPs) are to be developed under the direction of a Federal OSC. The Federal OSC shall ensure that ACPs include the information on consideration of historic properties and are developed in consultation with the parties specified in Section V of this agreement.
 - ii. Federal agencies with expertise in protection of historic properties available to assist the Federal OSC during preparedness planning include the Department of the Interior, (2) the ACHP, and other Federal land-managing agencies for properties on their lands. The primary source of information on historic properties in an area, particularly properties not on Federal lands, is the SHPO, who is the official appointed by the Governor as part of the State's participation in NHPA programs. Other parties that may assist are listed in V.A. of this PA.
 - iii. The National Program Center (NPC) of the National Park Service, consistent with its authority and responsibilities, will provide coordination of appropriate expertise to Area Committees and Regional Response Teams (RRTs) for pre-incident planning activities through the United States Coast Guard (Coast Guard) and the United States Environmental Protection Agency (EPA). The NPC will coordinate through the Commandant of the Coast Guard and the Office of Emergency and Remedial Response of EPA.
 - iv. Prior to finalizing or subsequently revising ACPs, the Federal OSC will provide a draft of sections addressing historic properties identification and protection to the parties identified in Section V.A. of this PA. Each party shall have 30 calendar days from receipt to review the draft and provide comments to the Federal OSC. Should any reviewing party file a timely objection to the draft or any portion thereof, the Federal OSC will consult with the objecting party to resolve the objection. If the objection cannot be resolved, the Federal OSC will provide documentation of the dispute to the ACHP and request their comments. The ACHP comments will be taken into account by the Federal OSC in finalizing or revising ACPs.
- c. Emergency Response Support/Coordination
 - i. To ensure historic properties are considered during emergency response, the Federal OSC must have access to reliable and timely expertise and support in order to make timely and informed decisions about historic properties.
 - ii. A Federal OSC may obtain historic properties expertise and support in any one of several ways. These include implementing an agreement with State or Federal agencies that have historic properties specialists on staff (see IV.B.2), executing a contract with experts identified in ACPs or hiring historic properties specialists on staff. Historic properties specialists made available under contract or hired must:
 1. Meet the qualifications listed in the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation, 8 Federal Register 44738-39 (September 29, 1983); see Appendix II; and
 2. Be available to assist the Federal OSC whenever needed.

V. PRE-INCIDENT PLANNING

- a. As part of pre-incident planning activities, Federal OSCs (or the OSC's management) shall consult with the SHPO, Federal land-managing agencies, appropriate Indian tribes and appropriate Native Hawaiian organizations, as defined in Section 301 of the NHPA, and the other interested parties identified during pre-incident planning, as described in Section IV.B of this PA, to:
 - i. Identify historic properties.
 1. Identify: 1) historic properties that have been listed in or determined eligible for inclusion in the National Register of Historic Places that might be affected by

response to a release or spill; and 2) unsurveyed areas where there is a high potential for the presence of historic properties.

2. Identify exclusions. These may be specific geographic areas or types of areas where, should a release or spill occur, historic properties are unlikely to be affected. This includes the specifics listed in Appendix I and any additional exclusions agreed on by the signatories to this or a regional PA. Incidents in areas covered by exclusions would not require consideration for protection of historic properties, except as provided in Section VI.A.1.
 - ii. Develop a list of parties that are to be notified in the event of an incident in a non-excluded area. This list should include the SHPO for the State in which the incident occurred, Federal and Indian tribal land owners or land managers and Hawaiian Native organizations in the area where the incident occurred, if any.
 - iii. Develop emergency response strategies that can be reasonably anticipated to protect historic properties. The Federal OSC shall ensure that response strategies, including personnel and equipment needed, are developed to protect or help protect historic properties at risk. This includes consideration of the sensitivity of historic properties to emergency response measures proposed in ACPs or other response plans, including chemical countermeasures and in situ burning.
- b. The Federal OSC shall ensure that historic properties protection strategies can be carried out by:
 - i. Identifying who will be responsible for providing expertise on historic properties matters to the Federal OSC during emergency response. Depending on the size and complexity of the incident, a Federal OSC historic properties specialist or a historic properties technical advisory group convened by the specialist may be the most effective mechanism;
 - ii. Providing information on availability of appropriate training for historic property specialists to participate in emergency response, -g., Hazardous Waste Operations and Emergency Response (HAZWOPER) training, familiarity with all relevant contingency plans and response management systems, etc.; and
 - iii. Working with the parties listed in section V.A. to obtain information for response personnel on laws protecting and activities that may potentially affect historic properties.

VI. FEDERAL LEAD EMERGENCY RESPONSE

- a. The Federal OSC shall determine whether the exclusions described in section V.A.1.b. apply.
 - i. If the incident affects only excluded areas, no further actions are necessary under this PA, unless:
 1. Previously unidentified historic properties are discovered during emergency response; or
 2. The SHPO (or appropriate Federal, Indian, or Hawaiian Native organizations) notifies the Federal OSC that a categorically excluded release or spill may have the potential to affect a significant historic property.
 - ii. If the area where a release or spill occurs has not been excluded, in the cases specified in Section VI.A. 1 .a or b, if the Federal OSC is unsure whether an exclusion applies, or if the specifics of the incident change so that it no longer fits into one of the exclusions, the remaining steps in this Section shall be followed.
- b. Activate the agreed-upon mechanism for addressing historic properties, including notification of the parties identified pursuant to Section V.A.2., and consultation with these parties concerning the identification of historic properties that may be affected, assessing the potential effects of the emergency response, and developing and implementing emergency response activities. These requirements for notification and consultation shall be satisfied if the Federal OSC makes reasonable and timely efforts to notify and consult the parties listed in this Section. Thereafter there shall be additional consultation to the extent practicable.
- c. Verify identification of historic properties.
 - i. Consult with the SHPO, land owners and/or land managers, appropriate Indian tribes and Native Hawaiian organizations, and other interested parties identified in pre-incident planning to verify the location of historic properties identified during the planning process and determine if other historic properties exist in areas identified in V .A. 1 .a.2. that might be affected by the incident or the emergency response. If newly discovered or unanticipated potential historic properties are encountered during emergency response

- actions, the Federal OSC shall either: 1) consult with the SHPO (or appropriate Federal, Indian, or Hawaiian Native organizations) to determine if the properties are eligible for inclusion in the National Register, or 2) treat the properties as eligible.
- d. Assess potential effects of emergency response strategies on historic properties. Such assessment shall be done in consultation with the parties listed in Section V A.
- i. The potential adverse effects of releases or spills and of emergency response on historic properties may include, but are not limited to:
 1. Physical destruction, damage, or alteration of all or part of the historic property;
 2. Isolation of the property from or alteration of the character of the property's setting when that character contributes to the property's qualification for the National Register; and
 3. Introduction of visual, audible, or atmospheric conditions that are out of character with the property or alter its setting.
 - ii. Emergency response actions that may have adverse effects on historic properties include, but are not limited to:
 1. The placement of physical barriers to deter the spread of released or spilled substances and the excavation of trenches to stop the spread of the released or spilled substances; and
 2. Establishing camps for personnel, constructing materials storage and staging yards, excavating borrow pits for fill materials, and constructing alignments for road access.
 - iii. Direct physical contact of historic properties with released or spilled substances may result in one or more of the following: 1) inability to radiocarbon date the contaminated resources; 2) acceleration of deterioration of an object or structure; or 3) prevention of identification of historic properties in the field. As a result, important scientific, historic, and cultural information may be lost.
- e. Make and implement decisions about appropriate actions. The Federal OSC shall take into account professional comments received from the parties listed in Section V.A. in making decisions that might affect historic properties.
- i. Emergency response strategies delineated in plans may need to be reviewed based on information available at the time of an actual incident. The purpose of this review is to evaluate whether implementation of the strategies in the plan might, for the emergency response action that is underway, adversely affect historic properties and, if so, how such effects might be avoided or reduced.
 - ii. Make arrangements for suspected artifact theft to be reported to the SHPO, law enforcement officials, and the land owner/manager.
 - iii. Arrange for disposition of records and collected materials.
 - iv. Ensure the confidentiality of historic property site location information, consistent with applicable laws, so as to minimize opportunities for vandalism or theft.
- f. Whenever the Federal OSC determines the requirements of this Section cannot be satisfied concurrently with the paramount requirement of protecting public health and safety, the determination shall be documented in a writing including the name and title of the person who made the determination; the date of determination; and a brief description of the competing values between public health and safety and carrying on the provisions of this Section. Notwithstanding such a determination, if conditions subsequently permit, the Federal OSC shall endeavor to comply with the requirements of this Section to the extent reasonably practicable.

VII. REGIONAL PAs

- a. Regional PAs may be developed as provided in I.A. as an alternative to this national PA. Regional PAs are to include the provisions of this PA and may include appropriate additional provisions responsive to regional concerns.
- b. A regional PA should be signed by appropriate regional-level Federal officials, State agencies, tribal officials and the ACHP.
- c. Either this PA or a PA developed at a regional level may be adopted by the RRT and incorporated or referenced in Regional Contingency Plans (RCPs), 36 CFR Section 300.210(b), and ACPs in the region.

VIII. AUTHORITY, EFFECTIVE DATE, WITHDRAWAL, AMENDMENT

- a. The signatories below are authorized to sign the PA on behalf of their respective Department, Agency or organization. This PA may be signed in counterparts.
- b. In order to allow sufficient time for pre-incident planning and other preparedness activities, this PA shall not become effective with respect to a signatory Department or Agency until ninety (90) days after it has been signed on the Department's or Agency's behalf.
- c. Any signatory may withdraw from this PA by sending, through an official authorized to act in this matter, written notice to all current signatories at least thirty (30) days in advance of the effective date of withdrawal. The requirements contained in this PA will remain in full force and effect with respect to remaining signatories.
- d. Nothing herein prevents the signatories from agreeing to amend this PA.

SIGNATORIES

Advisory Council on Historic Preservation

Chairman June 4, 1997

National Conference of State Historic Preservation Officers

President May 13, 1997

U.S. Environmental Protection Agency

Acting Deputy Director, Office of Emergency and Remedial Response May 23, 1997

U.S. Department of the Interior

Director, Office of Environmental Policy and Compliance June 4, 1997

U.S. Department of Transportation, Coast Guard

Assistant Commandant for Marine Safety and Environmental Protection May 13, 1997

National Park Service

Acting Deputy Director August 7, 1997

U.S. Department of Commerce, National Oceanic and Atmospheric Administration

Assistant Administrator for Ocean Services and Coastal Zone Management July 3, 1997

U.S. Department of Energy

Deputy Director November 7, 1997

U.S. Department of Defense

Deputy Under Secretary of Defense (Environmental Security) November 3, 1997

U.S. Department of Agriculture

Under Secretary of Defense for Natural Resources and Environment August 28, 1998